

DECISION



18731
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202246

DATE: July 2, 1981

MATTER OF: Jets Services, Inc.

DIGEST:

GAO will not review award of food service concession contract where only appropriated funds provided are for contract administration and no funds from contract performance flow to Government, except remote possibility of excess profits which serve only to deter high prices.

Jets Services, Inc. (Jets), protests the award of a food service concession contract to Canteen of Florida, Inc. (Canteen), pursuant to request for proposals (RFP) No. 10-4-0074-O, issued by the National Aeronautics and Space Administration, Kennedy Space Center (NASA).

Pursuant to the proposed concession agreement, the concessioner agrees "To operate with its own funds a general cafeteria business for [Kennedy Space Center] employees and installation visitors." NASA advises that the funds which flow to Canteen will be those which are generated by Canteen's performance of the contract. There is no expenditure of NASA appropriated funds. Therefore, it is NASA's position that GAO should decline jurisdiction since no appropriated funds will be expended in performance of the contract.

Jets believes that since NASA is a party to the contract and appropriated funds will be expended for substantial amounts of Government equipment, facilities, supplies and services to be furnished to the contractor for use in performing the contract, the contract involves appropriated funds. Therefore, Jets contends that GAO should review the protest.

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Our review of the proposed contract discloses that any awardee would receive the Government equipment, facilities, supplies and services. These items are apparently utilized by the concessioner as part of the Government's contract administration functions. Furthermore, the concession agreement does not obligate the Government for termination costs. Finally, the concessioner is entitled to retain profits from cafeteria, snack bar, and mobile canteen gross sales up to a certain percent of gross sales. Any excess profits will be used to improve service, product quality, increase portion size or reduce prices, which were initially proposed by the concessioner, during the contract term. Excess profits remaining at the end of the contract term will revert to the Government.

Our bid protest function is based on our authority to adjust and settle the Government's accounts and to certify balances in the accounts of accountable officers, pursuant to which we could, if necessary, take exception to the contract payment. 31 U.S.C. §§ 71, 74 (1976). Consequently, absent payments out of appropriated funds, we do not review contract awards even if the procuring party is an instrumentality of the United States. Further, we believe it would not be appropriate for this Office to take exception to a contract award merely because appropriated funds may be used by the procuring agency in connection with administering the contract. See Keco Industries, Inc., B-184911, B-185174, June 1, 1976, 76-1 CPD 352. Therefore, since the award of the contract does not involve the direct expenditure of appropriated funds and no funds flow to the Government as a result of the award, there would be no useful purpose served by our review. See Barry Stier, B-201850, March 3, 1981, 81-1 CPD 160; Arrow Transportation, Inc., B-201882, February 10, 1981, 81-1 CPD 90. The fact that the Government could receive excess profits is too remote for us to invoke jurisdiction. Moreover, the excess profits provision was not to provide the Government a source of revenue; rather, the provision is more of a policing provision--a deterrent to high prices.

Accordingly, we will not render a decision on this protest.

The protest is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel